"Theft" on the other hand is defined by the Penal Code (section 378) as follows:—

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

"Dishonestly" is defined by section 24 as follows:—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'".

In the Indian case of *Queen-Empress* v. *Sri Churn Chungo*[1] the facts were similar to those of the present case. Petheram, C.J., referred to the sections of the Indian Penal Code corresponding to the sections of our Code which have been quoted and went on to observe:—

"It is evident that it was the intention of the Legislature that it should be theft under the Code to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code."

On this view of the law which I have no hesitation in following the first accused should clearly have been found guilty of the offence charged against him. The appeal is accordingly allowed, the order of acquittal and discharge is set aside and a conviction is substituted for it.

Appeal allowed.

YAP TENG CHAI v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) June 1, 1959]

[Muar — Criminal Appeal No. 5 of 1959]

Penal Code s.224 — Attempting to escape from lawful custody — Adequacy of sentence.

Criminal Law and Procedure — Sentence — Alteration of sentence of lower Court — Observations on sentence.

In this case the appellant had been convicted of the offence of attempting to escape from the lawful custody under section 224 of the Penal Code and sentenced to one month's imprisonment and a fine of $300 in default three months' imprisonment. The facts showed that the offence in respect of which he was accused was trivial, no violence to person or property was used in the attempt, which appeared to have been made on the sudden impulse and the appellant was a first offender.

Held: the sentence was manifestly wrong in the sense that it was unsuitable to the proved facts and circumstances. Appeal against conviction dismissed, sentence varied.

Observations on sentence.

Cases referred to:—

(1) *Abu Bakar bin Alif* v. *R.* [1953] M.L.J. 19.

(2) *Public Prosecutor* v. *Fam Kim Hock* [1957] M.L.J. 20.

(3) *Lee* v. *R.* [1948-49] M.L.J. Supp. 87.

(4) *Kang Yeow Hooi* v. *Public Prosecutor* [1954] M.L.J. 233.

(5) *Abdul Karim* v. *R.* [1954] M.L.J. 86.

(6) *Yap Tan Lim* v. *R.* (1930), 2 M.C. 119; [1947] M.L.J. xvii.

(7) *Chua Ah Gan* v. *Public Prosecutor* [1958] M.L.J. liv.

MAGISTRATE'S CRIMINAL APPEAL.

C. P. S. Wong for the appellant.

Pawan Ahmad (Federal Counsel) for the respondent.

Hepworth J.: In this case the accused had been convicted of the offence of attempting to escape from lawful custody under section 224 of the Penal Code and sentenced to one month's imprisonment and a fine of $300 in default three months' imprisonment. He appealed against both conviction and sentence. I dismissed the appeal against conviction but allowed the appeal against sentence varying the sentence to one of a fine of $300 in default three months' imprisonment. I considered that the sentence was manifestly wrong in the sense that it was unsuitable to the proved facts and circumstances because the offence in respect of which he was in custody was trivial, no violence to person or property was used in the attempt, the attempt appeared to have been made on a sudden impulse and the accused was a first offender.

Now an Appellate Court should not alter a sentence merely because the members of the Court might have passed a different sentence. *(Abu Bakar bin Alif* v. *Rex*[1]*)*. The sentence of the Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. *(Public Prosecutor* v. *Fam Kim Hock*[2]*)*. When the sentence of a Court of first instance is varied by an Appellate Court it is in the majority of cases, as in the present case, because the sentence is unsuitable to the proved facts and circumstances. I think therefore it may prove of value if I recapitulate views, with which I respectfully agree, which in the past have been expressed on the subject from time to time by other Judges, in addition to expressing my own opinion.

In fixing sentence, the nature of the offence, the circumstances and the degree of deliberation must be taken into account. *(Lee* v. *Rex*[3]*)*.

Consideration should always be given to the imposition of a substantial fine with a view to avoiding the necessity of sending persons to prison who have committed offences which are not *mala per se*. *(Kang Yeow Hooi* v. *Public Prosecutor*[4]*)*.

In general I take the view that a sentence should be either a sentence of imprisonment or a sentence of fine and not both. Again speaking generally cases in which a sentence of imprisonment and fine might, in my opinion, fairly be imposed are cases of serious revenue offences and in the case of offences which are not *mala per se* but where it has become apparent that sentences of fine only on other persons in the area in respect

of similar offence in the recent past have been insufficient to act as a deterrent.

But any tendency to standardise punishment for any type of offence is to be deprecated because it means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type. *(Abdul Karim* v. *Regina*[5]*)*. The first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. Our law does not therefore fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the Court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person. *(Abu Bakar bin Alif* v. *R., supra)*.

Where an accused person pleads guilty, the prosecution in outlining the facts of the case in order to assist the Court in assessing the sentence, should not allege anything against the accused which cannot be substantiated. Statements of opinion or suspicion should be omitted and only matters of known facts or of argument arising out of proved facts should be given. *(Yap Tan Lim* v. *R.*[6] and *Chua Ah Gan (f)* v. *Public Prosecutor*[7]*)*.

Archbold (33rd Edn. at p. 218), after stating that as an aid to determining the appropriate punishment the Court will, after verdict, hear evidence for the prosecution or the accused, either *viva voce* or by affidavit, goes on to say:—

". . . in all trials after conviction there should be given accurate information as to the general character and other material circumstances of the prisoner even though such information was not available in the form of evidence proper, and that such information when given could rightly be taken into consideration by the Judge in determining the quantum of punishment unless it was challenged and contradicted by or on behalf of the prisoner, in which case the Judge should either direct proper proof to be given or should ignore the information. It is important that there should be precision and accuracy in any such information. A police officer called after conviction to give evidence of the character and antecedents of the prisoner should, in general, confine his evidence to the previous convictions (if any) and antecedents of the prisoner, including evidence of the prisoner's home and upbringing if the prisoner's age makes this information material. He should also inform the Court of any matters which he believes are not disputed by the prisoner and ought to be known to the Court. He should, further, inform the Court of anything known in the prisoner's favour, such as periods of employment and good conduct. Counsel for the prosecution should see that a police witness giving evidence after conviction is kept in hand and is not allowed to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner. The Judge has a right to inquire into any matter on which he thinks it right to ask for information".

I think that if Magistrates will bear the above observations in mind when called upon to assess sentence they will find their task much simplified.

Order accordingly.

Solicitors: *C. P. S. Wong & Co.*

LIM GAIS KHEE v. REG.

[A. Cr. J. (Buttrose J.) August 25, 1959]

[Singapore — Magistrate's Appeal No. 99 of 1959]

Penal Code s.304A — Negligence — Particulars of negligence — Charge containing insufficient particulars.

Criminal Law and Procedure — Charge — Framing — Alternative versions of accident — Criminal Procedure Code (Cap. 132), s.172(f).

The appellant was charged with causing death by negligence under section 304A of the Penal Code. At the commencement of the hearing in the District Court his counsel applied for particulars of the negligence alleged, but it was refused on the authority of *Public Prosecutor* v. *Chang Wan Seng*[1], a Federation case, where it was held that an accused person was not entitled to particulars of negligence under section 304A of the Penal Code because it was tantamount to a request for particulars of the evidence which the prosecution proposed to call.

Held: (1) the charge in this case did not contain sufficient particulars of the negligence alleged to enable the appellant to know the case he had to meet. Merely to tell the appellant in this case that he was charged with doing a negligent act negligently was insufficient and on that ground alone the appeal must succeed;

(2) at the close of the case for the prosecution a number of versions as to how the accident occurred were disclosed and it was incumbent on the Court in the light of the provisions of section 172(f) of the Criminal Procedure Code (Cap. 132) to make up its mind as to which, if any, of the possible but incompatible versions of the facts had been proved. It is not enough that the learned District Judge in his grounds of decision should in effect have done so. The appellant at the conclusion of the prosecution case was entitled to know which of the several alternative versions of the accident the Court found to be satisfactorily established and which constituted negligence. If it found itself unable to decide which account of the accident was the true one then the prosecution had failed to make out their case and the appellant should not have been called on for his defence. The learned District Judge should have come to a decision regarding the facts before calling upon the defence.

Public Prosecutor v. *Chang Wan Seng*[1] dissented from.

Observations on framing charge and duty of Court to satisfy itself thereon.

Cases referred to:—

(1) *Public Prosecutor* v. *Chang Wan Seng* [1954] M.L.J. 186.

(2) *Public Prosecutor* v. *Lee Pak* [1937] M.L.J. 265.

MAGISTRATE'S APPEAL.

H. E. Cashin for the appellant.

G. Tara Singh (Crown Counsel) for the respondent.

Buttrose J.: This was an appeal from a District Court which convicted the appellant of causing death by negligence under section 304A of the Penal Code. At the conclusion of the hearing, I allowed the appeal and quashed the conviction and sentence but because it raised important points I intimated I would give my reasons in writing later.

The appellant was charged in the Third Criminal District Court as follows:—